

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RUSSELL BEST,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a  
Delaware corporation,

Defendant.

NO. CV-06-172-RHW

**ORDER DENYING THE  
PARTIES' STIPULATED  
MOTION FOR PROTECTIVE  
ORDER**

Before the Court is the parties' Stipulated Motion for Protective Order (Ct. Rec. 36). The parties ask the Court to enter their proposed Stipulated Protective Order, which would allow the parties to designate as "confidential" materials containing business trade secrets and confidential proprietary information. Once a document receives such a designation, it is subject to the special rules set forth in the protective order that cover the dissemination and use of the specified document or information. The proposed protective order also states that if the designated material is to be included in any papers filed with the Court, it must be filed under seal until further order from the Court.

Generally, the manner in which the parties agree to manage the dissemination and use of the information between themselves during the discovery process does not cause the Court concern. The parties' proposed protective order, however, does more than manage the dissemination and use of certain materials during the discovery process. This proposed order attempts to restrict the access of the public to documents that would be part of court proceedings and, as such,

**ORDER DENYING THE PARTIES' STIPULATED MOTION FOR  
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1 requires the Court to inquire further into whether the proposed protective order  
2 impedes the public's common law right to access court proceedings and the First  
3 Amendment's protection of the same.

4 Generally, the public should be allowed access to litigation documents and  
5 information produced during discovery unless the party opposing disclosure shows  
6 "good cause" why a protective order is necessary. *Phillips v. General Motors*  
7 *Corp.*, 307 F.3d 1206, 1210 (9<sup>th</sup> Cir. 2002); *see also San Jose Mercury News, Inc.*  
8 *v. United States Dist. Court*, 187 F.3d 1096, 1103 (9<sup>th</sup> Cir. 1999) ("It is  
9 well-established that the fruits of pre-trial discovery are, in the absence of a court  
10 order to the contrary, presumptively public. Rule 26(c) authorizes a district court  
11 to override this presumption where 'good cause' is shown."); *In re Agent Orange*  
12 *Product Liability Litig.*, 821 F.2d 139, 145 (2d Cir.1987) ("[I]f good cause is not  
13 shown, the discovery materials in question should not receive judicial protection  
14 and therefore would be open to the public.").

15 On the other hand, Fed. R. Civ. P. 26(c) gives district courts broad latitude to  
16 grant protective orders to prevent disclosure of many types of information.  
17 *Phillips*, 307 F.3d at 1211 (noting that rule 26(c) authorizes district courts to issue  
18 "any order which justice requires to protect a party or person from annoyance,  
19 embarrassment, oppression, or undue burden." (Emphasis in original.) Fed. R. Civ.  
20 P. 26(c) requires, however, that the party asserting good cause bear the burden, for  
21 each particular document it seeks to protect, of showing that specific prejudice or  
22 harm will result if no protective order is granted. *Foltz v. State Farm Mut. Auto.*  
23 *Insur. Co.*, 331 F.3d 1122, 1131 (9<sup>th</sup> Cir. 2003).

24 Even if the Court were to find that "good cause" exists, it still must consider  
25 the public's common law right of access. The public has a federal common law  
26 right of access to all information filed with the Court, which in turn "creates a  
27 strong presumption in favor of access' to judicial documents which 'can be  
28 overcome' only by showing 'sufficiently important countervailing interests.'"

1 *Phillips*, 307 F.3d at 1212, *quoting San Jose Mercury News, Inc. v. United States*  
 2 *Dist. Court*, 187 F.3d 1096, 1102 (9<sup>th</sup> Cir. 1999). In deciding whether sufficient  
 3 countervailing interests exist, courts are directed to look to the “public interest in  
 4 understanding the judicial process and whether disclosure of the material could  
 5 result in improper use of the material for scandalous or libelous purposes or  
 6 infringement upon trade secrets.” *Id.* at 1213, *quoting Hagestad v. Tragesser*, 49  
 7 F.3d 1430, 1434 (9<sup>th</sup> Cir. 1999). Under Ninth Circuit precedent, the federal  
 8 common law right of access does not apply to documents filed under seal, unless  
 9 the document is attached to a dispositive motion. *Id.*<sup>1</sup> ; *Foltz*, 331 F.3d at 1136  
 10 (holding that the presumption of access is not rebutted where documents subject to  
 11 a protective order are filed under seal as attachments to a dispositive motion). In  
 12 this case, the Court is hesitant to enter a blanket protective order that requires  
 13 documents to be filed under seal, which would then trump the common law right to  
 14 access, without a specific showing of good cause.

15 In addition, when deciding whether to enter a blanket protective order, the  
 16 Court also must consider the public’s First Amendment rights. Under the First  
 17 Amendment, the public has a presumed right of access to court proceedings and  
 18 documents. *Oregonian Publ’g Co. v. United States Dist. Court for Dist. of*  
 19 *Oregon*, 920 F.2d 1462, 1465 (9<sup>th</sup> Cir. 1990). This presumed right can be  
 20 overcome only by an overriding right or interest “based on findings that closure is  
 21 essential to preserve higher values and is narrowly tailored to serve that interest.”  
 22 *Id.*, *quoting Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1985).

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24 <sup>1</sup>In *Phillips*, the Circuit recognized that in the case of nondispositive filings  
 25 in which a document is filed under seal, the court has presumably already decided  
 26 that the document deserved protection. Applying a strong presumption of access to  
 27 the document would “undermine, and possibly eviscerate, the broad power of the  
 28 district court to fashion protective orders.” *Phillips*, 307 F.3d at 1213.

1 “The interest is to be articulated along with findings specific enough that a  
2 reviewing court can determine whether the closure order was properly entered.”  
3 *Id.*

4 Given both the public’s common law right to access and the public’s First  
5 Amendment right of access to court proceedings and documents, the Court declines  
6 to exercise its discretion to enter a protective order in this case which would  
7 require documents to be filed under seal without a proper showing of good cause.  
8 *See Foltz*, 331 F.3d at 1131 (commenting on the fact that blanket protective orders  
9 make appellate review difficult).

10 Accordingly, **IT IS HEREBY ORDERED:**

11 1. The parties’ Stipulated Motion for Protective Order (Ct. Rec. 36) is  
12 **DENIED.**

13 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
14 this Order and to provide copies to counsel.

15 **DATED** this 9<sup>th</sup> day of July, 2007.

16 *S/ Robert H. Whaley*

17 **ROBERT H. WHALEY**  
18 Chief United States District Court

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